2009

Smith's Food and Drug, Inc. v. Utah Labor Commission : Brief of Respondent

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

SMITH'S FOOD AND DRUG, INC.,	)	
	)	
Petitioner / Appellant,	)	Court of Appeals
	)	Case No: 20090292
vs.	)	
	)	Priority 7
UTAH LABOR COMMISSION	)	
and GINA CHRISTENSEN,	)	Labor Commission Case Nos.:
	)	02-0436; 02-0948: 02-949
Respondents.	)	

BRIEF OF RESPONDENT, UTAH LABOR COMMISSION

Bret A. Gardner
Kristy L. Bertelsen
BLACKBURN & STOLL, LC
257 East 200 South, Suite 800
Salt Lake City, Utah 84111

Attorney for Petitioner
Smith's Food and Drug, Inc.

Richard R. Burke
KING & BURKE PC
7390 South Creek Road, #104
Sandy UT 84093

Attorney for Respondent
Gina Christensen

Alan Hennebold
Utah Labor Commission
160 East 300 South 3rd Floor
P O Box 146600
Salt Lake City UT 84111

Attorney for Respondent,
Utah Labor Commission

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Attorney for Respondent
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Alan Hennebold
Utah Labor Commission
160 East 300 South 3rd Floor
P O Box 146600
Salt Lake City UT 84111

Attorney for Respondent,
Utah Labor Commission

TABLE OF CONTENTS

Introduction 1

Jurisdiction 1

Issue and Standard of Review 1

Standard of Review 2

Preservation of issue for review 3

Determinative Statues 3

Statement of the case 3

Nature of the Case 3

Course of Proceedings 4

Statement of Facts 5

Summary of Argument 6

Argument 8

Point One: Ms. Christensen has established that her cervical injury is compensable under §401 of the Utah Workers' Compensation Act. 8

A. Ms. Christensen suffered an "injury by accident" 9

B. Ms. Christensen's injury arose out of and the in the course of her employment 10

Point Two: Smith's is not entitled to convert Ms. Christensen's workers' compensation claim into a claim for occupational disease benefits. 11

Conclusion 15

TABLE OF AUTHORITIES

Cases:
A.E. Clevite v. Labor Commission,
996 P.2d 1072 (Utah App. 2000), cert. denied, 4 P.3d 1289 (Utah 2000).....2

Allen v. Industrial Commission,
729 P.2d 15, (Utah 1986).....7, 8, 9, 10, 11, 12, 13

Avila v. Icon, Commission Case No. 99-0776 14

Burgess v. Siaperas Sand & Gravel,
965 P.2d 583 (Utah App. 1998).....15

Chandler v. Industrial Commission,
184 P. 1020 (Utah 1919).....15

Maryland Ca. Co. v. Industrial Comm.,
12 Utah 2d 223, 364 P.2d 1020 (Utah 1961).....15

Murphy v. City Market, Commission Case No. 01-0828 14

Olsen v. Samuel McIntyre Inv. Co.,
956 P.2d 257 (Utah 1998).....15

Park Utah Consol. Mines v. Industrial Commission,
84 Utah 841, 36 P.2d 979 (Utah 1934).....15

Salt Lake County v. Labor Commission,
208 P.3d 1087 2

Thompson v. Industrial Commission,
23 P.2d 939 (Utah 1933).....9

Whitear v. Labor Commission,
973 P.2d 982 (Utah App. 1998).....5

Statutes:
Utah Code Annotated §34A-1.....2

Utah Code Annotated §34A-1-301 2

Utah Code Annotated §34A-2-102(10)(b) 13

Utah Code Annotated §34A-2-401 ..... 2, 3, 6, 7, 8, 9, 10, 11

Utah Code Annotated §34A-2-801(8) 1

Utah Code Annotated §34A-3-103 3

Utah Code Annotated §34A-3-110 12

Utah Code Annotated §63G-4-403(4)(h)(i) 2

Utah Code Annotated §78-2a-3(2)(a) 1

Other:

Larson's Workers' Compensation Law, Vol. 1 §3.01, p.3-2 10

Larson's Workers' Compensation Law, Vol. 2 §43.02 13

INTRODUCTION

Gina Christensen claims disability and medical benefits under the Utah Workers' Compensation Act for an injury to her cervical spine. The Utah Labor Commission has concluded that Ms. Christensen's injury is compensable under the Utah Workers' Compensation Act and has ordered Smith's Food and Drug to pay benefits accordingly. Smith's petition for review to the Utah Court of Appeals argues that Ms. Christensen's claim should be treated as a "disease" rather than an "injury" and that Smith's liability for Ms. Christensen's benefits should be reduced pursuant to the apportionment provisions in the Utah Occupational Disease Act.

JURISDICTION

The Utah Court of Appeals has jurisdiction over Smith's petition for review pursuant to Utah Code Annotated § 78-2a-3(2) (a) and § 34A-2-801(8).

ISSUE AND STANDARD OF REVIEW

The Commission accepts Smith's statement of the issue, with the following caveats:

- Smith's statement of the issue portrays Ms. Christensen as suffering a cervical injury that "occurred gradually over time from July or August 2001 to November 20, 2001." (Smith's initial brief, page 1.) In fact, Ms. Christensen suffered an acute cervical disc herniation in mid-November 2001. (Appendix B, page 2; Record at page 209.)

- Smith's statement of the issue suggests that the controlling issue in this case is whether Ms Christensen suffered an "accident." However, § 34A-2-401 (1) of the Utah Workers' Compensation Act's use of the word "accident" is to modify "injury." Thus, § 401 does not require Ms. Christensen to prove an "accident'; the statute requires her to prove an "injury by accident." This distinction between "accident" and "injury by accident" is discussed further in Point One of this brief.

Standard of review: This issue presented by Smith's petition for review involves the application of Utah's workers' compensation laws to the facts of Ms. Christensen's claim. The Utah Legislature has granted the Commission ". . . full power, jurisdiction, and authority to . . . apply the law in . . . any . . . title or chapter it administers." See § 34A-1-301of the Utah Labor Commission Act; Title 34A, Chapter 1, Utah Code Annotated.

In light of the Labor Commission's explicit statutory authority to apply the state's workers' compensation laws to Ms. Christensen's claim, this Court should uphold the Commission's application of those laws unless the Commission's application is so unreasonable as to constitute an abuse of discretion under § 63G-4-403(4) (h) (i) of the Utah Administrative Procedures Act. *Salt Lake County v. Labor Commission*, 208 P.3d 1087, 1089; *A.E. Clevite v. Labor Commission*, 996 P.2d 1072, 1074 (Utah App. 2000), cert. denied, 4 P.3d 1289 (Utah 2000).

Preservation of issue for review: Smith's raised the foregoing issue in proceedings before the Commission, thereby preserving the issue for appellate review. (R. 147-159.)

DETERMINATIVE STATUTES

Section 34A-2-401 of the Utah Workers' Compensation Act.

> **Compensation for industrial accidents to be paid.**
> (1) An employee described in Section **34A-2-104** who is injured and the dependents of each such employee who is killed, by accident arising out of and in the course of the employee's employment, wherever such injury occurred, if the accident was not purposely self-inflicted, shall be paid:
> (a) compensation for loss sustained on account of the injury or death;
> (b) the amount provided in this chapter for:
> (i) medical, nurse, and hospital services;
> (ii) medicines; and
> (iii) in case of death, the amount of funeral expenses.
> (2) The responsibility for compensation and payment of medical, nursing, and hospital services and medicines, and funeral expenses provided under this chapter shall be:
> (a) on the employer and the employer's insurance carrier; and
> (b) not on the employee.
> . . . .

Section 34A-3-103 of the Utah Occupational Disease Act.

> **Occupational diseases.** For purposes of this chapter, a compensable occupational disease means any disease or illness that arises out of and in the course of employment and is medically caused or aggravated by that employment.

STATEMENT OF THE CASE

Nature of the Case: Smith's seeks appellate review of the Commission's award of benefits to Ms. Christensen under the Utah Workers' Compensation Act.

Course of Proceedings: Ms. Christensen filed claims with the Commission seeking benefits under the Utah Workers' Compensation Act for injuries to her cervical spine caused by her work at Smith's. (R. at 2 and 23.) Administrative Law Judge Hann held an evidentiary hearing on Ms. Christensen's claim (R. at 171-196) and referred the medical aspects of the claim to an impartial panel of medical experts. (R. 67-68.) Judge Lima then assumed responsibility for the adjudication of Ms. Christensen's claim and received the medical panel's reports. (R. at 71, 118, 127.) On June 29, 2006, Judge Lima ruled that Ms. Christensen's work at Smith's during November 2001 had exacerbated Ms. Christensen's preexisting cervical problems and produced constant left-shoulder and arm pain. (Appendix A, page 10; R. at 140.) Judge Lima therefore concluded that Ms. Christensen had suffered a work-related accidental injury and was entitled to medical and disability benefits under the Utah Workers' Compensation Act. (Appendix A, page 13; R. at 143.)

Smith's filed a timely motion for review of Judge Lima's decision with the Commission. Smith's argued that Ms. Christensen's cervical spine condition should be deemed an occupational disease and adjudicated under the Utah Occupational Disease Act. Smith's further argued that, as an occupational disease, Ms. Christensen's spinal condition should be apportioned between work and non-work causes and that Smith's should be required to pay benefits only to the extent of the work-related causes. (R. at 147-159.)

The Commission's decision of March 16, 2009, rejected Smith's argument and upheld Judge Lima's determination that Ms. Christensen's cervical condition was an "injury by accident" and compensable as such under the Utah Workers' Compensation Act. On that basis, the Commission declined to apportion Ms. Christensen's benefits between work and non-work causes. (Appendix B; R. at 208-210.)

On April 15, 2009, Smith's filed its petition for review requesting appellate review of the Commission's decision. (R. 212)

Statement of Facts: Smith's has not challenged the Commission's findings of fact on appeal, nor has Smith's marshaled the evidence to demonstrate that the Commission's findings are unsupported by substantial evidence. Consequently, the Commission's findings must be accepted as accurate. *Whitear v. Labor Commission*, 973 P.2d 982, 985 (Utah App. 1998). The Commission found the following facts to be material to Ms. Christensen's claim.

Ms. Christensen had a degenerative condition of her cervical spine since 1989, before she began work at Smith's. Ms. Christensen worked in Smith's dairy department for approximately eight years. During that time, she experienced intermittent episodes of shoulder pain, but these episodes of shoulder pain always resolved. (Appendix B, page 1; R. at 208.)

During November 2001, Ms. Christensen worked 12-hour shifts as a "cheese cook" at Smith's. This assignment required Ms. Christensen to repeatedly lift, connect,

and manipulate various industrial-sized tools such as steel screens, cross-cut knives, heaters, paddles, "pushers," and cleaning brushes. Some of these tools weighed as much as 70 pounds. (Appendix B, page 1; R. at 208.)

In mid-November 2001 Ms. Christensen noted stiffness and soreness in her left shoulder that was different from the intermittent pain she had experienced in the past. She sought medical treatment on November 16, 2001, and was ultimately diagnosed with herniated cervical discs. She underwent surgery on February 28, 2002. (Appendix B, page 2; R. at 209.) In the course of this surgery, Ms. Christensen's surgeon observed acute herniations at various levels of Ms. Christensen's cervical spine. In the opinion of both Ms. Christensen's surgeon and the impartial medical panel, these herniated discs constituted an "an acute event as the result of a work injury." (Appendix B, page 2; R. at 127--medical panel report; see also Dr. McFarlane's opinion, page 54 of Medical Records Exhibit.)

SUMMARY OF ARGUMENT

Section 401 of the Utah Workers' Compensation Act provides benefits to employees injured by accident arising out of and in the course of employment. The Commission awarded benefits to Ms. Christensen based on the Commission's determination that her cervical injuries meet § 401's requirements. Specifically, the Commission determined Ms. Christensen's condition: 1) constitutes an "injury by accident" and 2) "arose out of and in the course of her employment."

Smith's does not challenge the Commission's findings regarding the nature and cause of Ms. Christensen's cervical injury. Nor does Smith's contest the Commission's determination that Ms. Christensen's injury arose out of and in the course of her employment. Instead, Smith's argues that Ms. Christensen cervical condition cannot be considered an "accident" because Ms. Christensen cannot pinpoint a specific event as a starting point for the condition.

Smith's argument reflects a fundamental misreading of § 401. The statute does not require proof of an accident—it requires proof of an "injury **by** accident." And as interpreted by the Utah Supreme Court in *Allen v. Industrial Commission,* 729 P.2d 15, 22 (Utah 1986), § 401's requirement of "injury by accident" is satisfied if an unexpected or unintended occurrence is *either* the cause *or* the result of an injury. Consequently, Ms. Christensen's unexpected and unintended cervical condition constitutes an injury by accident and Ms. Christensen is entitled to benefits under the Utah Workers' Compensation Act.

Smith's also argues that it would be "fair" to Smith's if Ms. Christensen's claim under the Utah Workers' Compensation Act was transformed into a claim for occupational disease benefits under the Utah Occupational Disease Act. Smith's contends that this would allow the apportionment of Ms. Christensen's cervical injury between work-related and non-work causes, thereby reducing Smith's liability for Ms. Christensen's benefits.

Smith's has identified no provision of law that permits a valid workers' compensation claim to be transformed into an occupational disease claim solely to allow an employer to reduce the benefits payable to an injured worker. Such a result would deprive Ms. Christensen of the benefits that are due for her legitimate workers' compensation claim. It would also violate the well-established principle that Utah's workers' compensation laws are to be liberally applied in favor of compensation.

The Commission has properly applied the Utah Workers' Compensation Act to the facts of Ms. Christensen's claim and has reasonably determined that she is entitled to workers' compensation benefits. The Commission respectfully asks this Court to affirm the Commission's decision.

ARGUMENT

POINT ONE: MS. CHRISTENSEN HAS ESTABLISHED THAT HER CERVICAL INJURY IS COMPENSABLE UNDER § 401 OF THE UTAH WORKERS' COMPENSATION ACT.

Section 401 of the Utah Workers' Compensation Act requires employers and their insurance carriers to pay workers' compensation benefits to "employees . . . injured . . . by accident arising out of and in the course of . . . employment." In *Allen at* 18, the Utah Supreme Court observed that § 401: "creates two prerequisites for a finding of a compensable injury. First, the injury must be 'by accident.' Second, the language 'arising out of [and] in the course of employment' requires that there be a causal connection between the injury and the employment." Ms. Christensen is entitled

to workers' compensation benefits because her cervical injury satisfies both these prerequisites.

A. MS. CHRISTENSEN SUFFERED AN "INJURY BY ACCIDENT"

The first prerequisite of § 401 is that an employee claiming workers' compensation benefits must have suffered an "injury by accident." Smith's misconstrues this requirement by isolating the word "accident" from the statutory phrase "injury by accident" and then treating "accident" as a stand-alone requirement. Smith's then asserts that Ms. Christensen did not have an "accident" because she cannot point to a particular incident or event that triggered her cervical problems. (For example, see Smith's brief at pages 4, 11, 14, and 16.)

By deconstructing the statutory phrase "injury by accident" in the manner described above, Smith's argues that an injured worker cannot qualify for workers' compensation benefits unless there is a "specific event or occurrence known as the starting point" of the injury. [Quoting Smith's initial brief at page 20,which in turn cites *Thompson v. Industrial Commission*, 23 P.2d 939 (Utah 1933). However, Smith's interpretation of the meaning of "accident" within § 401 has been rejected by the Utah Supreme Court's seminal decision in *Allen v. Industrial Commission,* 729 P.2d 15 (Utah 1986). In *Allen*, the Supreme Court held that injury "by accident" is "an unexpected or unintended occurrence that may be *either* the cause *or* the result of an injury." *Allen* at 22.

In applying the *Allen* definition of "injury by accident" to Ms. Christensen's claim, the Commission found that Ms. Christensen was engaged in her customary work duties when she developed a constant pain in her left shoulder and arm. This pain stemmed from acute disc herniations that were an unexpected and unintended result of her work. Based on these unchallenged facts, the Commission properly applied § 401's "injury by accident" test as interpreted in the *Allen* decision and concluded that Ms. Christensen had been "injured by accident."

B. MS. CHRISTENSEN'S INJURY AROSE OUT OF AND IN THE COURSE OF HER EMPLOYMENT.

Section 401's second prerequisite for compensability under the Utah Workers' Compensation Act is that the injury must "[arise] out of and in the course of the employee's employment."[1] This requires proof of both legal and medical causation. "To meet the legal causation requirement, a claimant with a preexisting condition must

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[1] Professor Larson discusses this point in *Larson's Workers' Compensation Law,* Vol. 1, §3.01, p. 3-2:

> The heart of every compensation act, and the source of most litigation in the compensation field, is the coverage formula . . . 'arising out of and in the course of employment.' . . . Few groups of statutory words in the history of law have had to bear the weight of such a mountain of interpretation as has been heaped upon this slender foundation. It is not surprising , then, that to make the task of construction easier, the phrase was broken in half, with the 'arising out of' portion construed to refer to causal origin, and the 'course of employment' portion to the time, place and circumstances . . . . There are plentiful dicta which tell us that each test must be independently applied and met. For the most part, this observation does no harm, but it should never be forgotten that the basic concept of compensation coverage is unitary, not dual, and is best expressed in the term 'work connection'.

show that the employment contributed something substantial to increase the risk he already faced in everyday life because of his condition. This additional element of risk in the workplace is usually supplied by an exertion greater than that undertaken in normal, everyday life." *Allen* at 25. Medical causation "requires that the claimant prove the disability is medically the result of an exertion or injury that occurred during a work-related activity." *Allen* at 26.

Smith's does not challenge the Commission's determination that, even though Ms. Christensen suffered from preexisting cervical problems, her work exertions at Smith's were sufficient to constitute the legal cause of her cervical injury. Likewise, Smith's does not challenge the Commission's finding that Ms. Christensen's work exertions medically caused her herniated cervical discs. Thus, the Commission properly determined that Ms. Christensen satisfied § 401 (1)'s second prerequisite that her injury "arose out of and in the course of" her employment at Smith's. Consequently, Ms. Christensen is entitled to compensation under the Utah Workers' Compensation Act.

POINT TWO: SMITH'S IS NOT ENTITLED TO CONVERT MS. CHRISTENSEN'S WORKERS' COMPENSATION CLAIM INTO A CLAIM FOR OCCUPATIONAL DISEASE BENEFITS.

Smith's argues it is "unfair" for Ms. Smith to receive full payment of workers' compensation benefits for her cervical injuries because those injuries are, to some extent, related to Ms. Christensen's pre-existing, non-work cervical problems. To

correct this perceived "unfairness," Smith's argues that Ms. Christensen's workers' compensation claim should be transformed into an occupational disease claim. This would allow Smith's to avail itself of § 34A-3-110 of the Utah Occupational Disease Act, which apportions liability for occupational disease benefits between work and non-work factors.

As a preliminary matter, it should be noted that the Utah Workers' Compensation Act has its own methods--"legal causation" and "medical causation"--to limit workers' compensation benefits in cases where injuries are due to preexisting, non-work conditions.

"To meet the legal causation requirement, a claimant with a preexisting condition must show that the employment contributed something substantial to increase the risk he already faced in everyday life because of his condition. This additional element of risk in the workplace is usually supplied by an exertion greater than that undertaken in normal, everyday life. This extra exertion serves to offset the preexisting condition of the employee as a likely cause of the injury, thereby eliminating claims for impairments resulting from a personal risk rather than exertions at work." *Allen* at 25.

And with respect to medical causation, "[t]he purpose of the medical cause test is to ensure that there is a medically demonstrable causal link between the work-related exertions and the unexpected injuries that resulted from those strains. The medical

causal requirement will prevent an employer from becoming a general insurer of his employees and discourage fraudulent claims." *Allen* at 27.

These principles of legal causation and medical causation protect employers from claims that are not reasonably related to the claimant's work.

The Commission agrees with Smith's that occupational diseases must be adjudicated under the Utah Occupational Disease Act while claims for injuries by accident fall under the Utah Workers' Compensation Act. That principle is specifically embodied in § 34A-2-102 (10) (b) of the Act: "'Personal injury by accident arising out of and in the course of employment' does not include a disease, except as the disease results from the injury." The Commission also acknowledges that close cases exist where it is difficult to apply § 102 (1) (b)'s division between "injury by accident" and "disease." However, Ms. Christensen's cervical injury is not one of those unusually difficult cases.

The undisputed facts of Ms. Christensen's case establish that she suffered acute cervical disc herniations as a result of her unusually strenuous work duties at Smith's. While it is true that Ms. Christensen already had a degenerative spinal condition that fact does not necessarily preclude her from claiming workers' compensation benefits. "Just because a person suffers a preexisting condition, he or she is not disqualified from obtaining compensation. Our cases make clear that 'the aggravation or lighting up of a pre-existing disease by an industrial accident is compensable . . . .' (Citation

omitted.)" *Allen* at 25. Likewise, *Larson's Workers' Compensation Law,* Vol. 2, § 43.02, notes that: "[a] large majority of jurisdictions now hold that when usual exertion leads to something actually breaking, herniating, or letting go, with an obvious sudden mechanical or structural change in the body, the injury is accidental."

Smith's has identified two prior Commission decisions as supporting Smith's argument that Ms. Christensen's claim should be converted to an occupational disease claim. In the first of these, Avila v. Icon, Commission Case No. 99-0776; (attached as Appendix C), the Commission found that "Ms. Avila suffers from Keinbock's disease, which developed gradually over time and not as the result of any specific event." Thus, Ms. Avila's claim did, in fact, stem from a disease. In that respect it is distinguishable from Ms. Christensen's cervical condition, which involved a relatively rapid onset of constant left-shoulder and arm pain generated by acute cervical disc herniations that were caused by her work exertions.

The second Commission case referenced by Smith's is Murphy v. City Market, Commission Case No. 01-0828. (Attached as Appendix D.) In that case, the Commission only addressed whether a work-related aggravation of Ms. Murphy's pre-existing disease was compensable under the Utah Occupational Disease Act. As with Avila v. Icon, supra, the facts and issue in dispute in Ms. Murphy's claim are different than the facts and issue presented in Ms. Christensen's case.

Finally, Smith's identifies no provision of law authorizing the Commission or

this Court to transform Ms. Christensen's valid claim for workers' compensation benefits into a claim for occupational disease benefits so that Smith's will escape some liability and, conversely, Ms. Christensen will receive only partial compensation. To grant Smith's request would be directly contrary to the long-established principle that the Utah's workers' compensation laws are to be liberally construed in favor of compensation. See *Chandler v. Industrial Commission*, 184 P. 1020, 1021 (Utah 1919); *Park Utah Consol. Mines v. Industrial Commission*, 84 Utah 841, 36 P.2d 979, 981 (Utah 1934); *Maryland Cas. Co. v. Industrial Comm.*, 12 Utah 2d 223, 364 P.2d 1020, 1022 (Utah 1961). Both the Utah Supreme Court and this Court continue to reaffirm the continued vitality of the principle of liberal construction: *Olsen v. Samuel McIntyre Inv. Co*, 956 P.2d 257 at 260 (Utah 1998); *Burgess v. Siaperas Sand & Gravel*, 965 P.2d 583, 588 (Utah App. 1998).

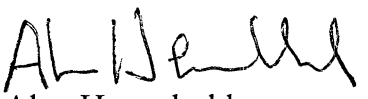
Smith's argument that the Commission should have applied the provisions of the Utah Workers' Compensation Act in a restrictive manner in order to reduce Ms. Christensen's ability to receive compensation is plainly contrary to the fundamental principle, discussed above, that Utah's workers' compensation laws are to be applied liberally in favor of payment of benefits.

CONCLUSION

The Commission respectfully submits that the Commission has properly applied the provisions of Utah's workers' compensation laws in determining that Ms.

Christensen is entitled to workers' compensation benefits for her work-related cervical injuries. Smith's has failed to establish any basis that would justify changing Ms. Christensen's workers' compensation claim into an occupational disease claim so that Smith's can reduce its liability. In fact, such a result would be contrary to the underlying purposes of Utah's workers' compensation system. The Commission therefore respectfully asks this Court to affirm the Commission's decision awarding workers' compensation benefits to Ms. Christensen.

Dated this 19th day of May, 2009.



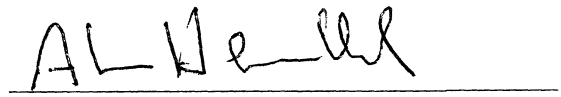
Alan Hennebold
General Counsel
Utah Labor Commission

Certificate of Mailing

I hereby certify that on the 19th day of May, 2009, two true and correct copies of the foregoing Brief of Respondent, Utah Labor Commission, were mailed by U S Mail, postage prepaid to the following:

BRET A. GARDNER
KRISTY L. BERTELSEN
BLACKBURN & STOLL LC
257 EAST 200 SOUTH STE 800
SALT LAKE CITY UT 84111

RICHARD R. BURKE
KING & BURKE PC
7390 SOUTH CREEK ROAD #104
SANDY UT 84093



APPENDIX A

UTAH LABOR COMMISSION
ADJUDICATION DIVISION
P. O. Box 146615
Salt Lake City, Utah 84114-6615
Telephone: 801-530-6800

GINA CHRISTENSEN,	*	
	*	
Petitioner,	*	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
vs.	*	
	*	
SMITH'S FOOD & DRUG,	*	Case Nos. 2002948, 2002949, 2002436
	*	
Respondent.	*	Judge Lorrie Lima
	*	
	*	

HEARING: November 20, 2003, 160 East 300 South, Salt Lake City, Utah. The hearing was pursuant to Order and Noticed of the Utah Labor Commission.

BEFORE: Debbie Hann, Administrative Law Judge.

APPEARANCES: The petitioner, Gina Christensen, was present and represented by Richard R. Burke, Esq.

The respondent, Smith's Food & Drug, was represented by Bret Gardner, Esq.

6-47-06

STATEMENT OF CASE

Case Number 2002436 - February 1, 2001, Date of Injury

On April 23, 2002, Gina Christensen (Petitioner) filed an Application for Hearing and alleged entitlement to medical expenses, recommended medical care, temporary total compensation and interest resulting from a February 1, 2001, industrial accident when she hit her neck. On May 7, 2002, the Utah Labor Commission (Commission) issued a Notice of Formal Adjudicative Proceedings and Order for Answer. On June 5, 2002, Smith's Food & Drug (Respondent) filed an Answer and denied Petitioner was injured as alleged because the accident was never reported. It further denied that Petitioner was injured by accident as she alleged.

At the hearing, Respondent did not pursue the lack of notice defense based upon Petitioner's written report of the accident on the day it occurred to Respondent. Respondent denied the accident was the medical cause of Petitioner's cervical spine condition.

Case Number 2002948 - November 20, 2001, Date of Injury

On August 27, 2002, Petitioner filed an Application for Hearing and alleged entitlement to medical expenses, recommended medical care, temporary total compensation, temporary partial compensation, permanent partial compensation, travel expenses and interest resulting from a November 20, 2001, cumulative trauma accident due to Petitioner's work activities of stirring, lifting and carrying large vats of cottage cheese. On September 18, 2002, the Commission issued a Notice of Formal Adjudicative Proceedings and Order for Answer. On October 18, 2002, Respondent filed an Answer and denied that Petitioner was injured as alleged because she never reported an accident, cumulative trauma or otherwise. Respondent further denied that Petitioner was injured by accident as alleged.

At the hearing, Respondent did not pursue the lack of notice defense. Respondent denied the accident was the medical cause of Petitioner's cervical spine condition.

Case Number 2002949 - Occupational Disease period of exposure 1994, through 2002.

On August 27, 2002, Petitioner filed an Application for Hearing and alleged entitlement to medical expenses, recommended medical care, temporary total compensation and interest resulting from an industrial exposure due to repetitive lifting, reaching and squeezing over the period 1994, through 2002, resulting in a neck condition. On September 18, 2002, the Commission issued a Notice of Formal Adjudicative Proceedings and Order for Answer. On October 18, 2002, Respondent filed an answer and denied the claim because Petitioner failed to timely report an occupational disease. It denied Petitioner's condition was the result of an occupational exposure.

At the hearing, Petitioner withdrew the occupational disease claim and the parties agreed the case should be dismissed.

COURSE OF PROCEEDINGS

On June 2, 2004, a Findings of Fact & Interim Order was issued by Judge Hann. On June 24, 2004, the medical issues were referred to a Commission medical panel. On February 24, 2005, the medical panel filed its report. On February 24, 2005, a copy of the medical panel report was mailed via certified mail to each party and they were allowed 15 days to file an objection.

On August 31, 2005, the medical panel was asked to clarify its medical panel report. On September 8, 2005, the medical panel filed a supplemental report. On September 9, 2005, a copy of the report was mailed via certified mail to each party and they were allowed 15 days to respond.

On December 29, 2005, the medical panel was asked to clarify its medical panel report. On January 11, 2005, the medical panel filed a supplemental report. On January 12, 2006, a copy of the report was mailed via certified mail to each party and they were allowed 15 days to respond.

OBJECTION TO MEDICAL PANEL REPORT

Section 34A-2-601(d)(ii) and (iii) of the Workers Compensation Act outlines the objection process. Any objection filed under this provision is to the entry of the medical panel report into the record. However, the preponderance of the evidence must still be considered in reaching the final determination. Thus, the objection does not go to the weight the report should be given but to its admission into the record.

On March 8, 2005, an Order was issued to allow the parties to file any objection to the medical panel report by March 18, 2005. Petitioner filed a timely objection on March 18, 2005. On April 4, 2005, Respondent filed an untimely response.

On September 23, 2005, Respondent filed an untimely objection to the medical panel supplemental report. On November 7, 2005, Petitioner filed an untimely response.

Petitioner argued that apportionment of a permanent impairment to a preexisting condition is appropriate where there is demonstrated evidence of cervical problems which pre-date the industrial injury. Petitioner asserted that the only evidence presented as a prior injury or limitation was Petitioner's industrial incident on February 1, 2001, which the medical panel determined was not medically connected to her cervical condition. Petitioner further argued that medical expenses cannot be apportioned in industrial accident/cumulative trauma cases.

Based on the foregoing, there is nothing within Petitioner's objection that would prevent the medical panel report from being entered into the evidentiary record. The medical panel conducted a comprehensive review of the history and development of Petitioner's medical condition. The panel had access to Petitioner's compete medical history as well as an opportunity to personally examine her. With that information the panel performed the function requested of it – the impartial application of the panel's medical knowledge, experience and judgment to the circumstances of Petitioner's case. Accordingly, the medical panel report is admitted into the record, and any facts found by the medical panel not in conflict with the Findings of Fact are admitted into the record pursuant to Utah Code Ann. §34A-2-601(2)(d).

FINDINGS OF FACT

1. Employment and Compensation.

Petitioner was employed in Respondent's dairy for approximately eight years. In 2001, Petitioner's job was to train new hires on how to make cultured dairy products and to fill in for dairy workers who were on vacation. The parties stipulated that on February 1, 2001, Petitioner's weekly compensation rate was $408.00 and on November 20, 2001, it was $421.00.

2. Industrial Injuries and Medical Treatment.

A. February 1, 2001.

On February 1, 2001, Petitioner was changing a roll of shrink wrap on the shrink wrap

machine. The machine was about 6 feet tall, 4.5 feet wide and 15-16 feet long. Petitioner was bending over with her legs bent to lift out the empty roll of shrink wrap by pulling on a handle. As she lifted the handle, it broke partly loose when a bolt holding it sheared, causing her to stumble backward about 2 to 2.5 feet and hit the back of her neck on an electrical box attached to the wall that stuck out about 2 to 2.5 feet. The blow to Petitioner's neck was across her neck as she hit the edge of the box causing her head to go forward. Petitioner's arms went numb, a sensation she described as similar to hitting one's "funny bone" and she lost feeling in her index finger and thumb. The numbness went away in about 30-45 seconds. About two hours later, Petitioner's neck became stiff. Petitioner reported the injury that day and filled out a report (Exhibit P-1). Petitioner left her shift a couple of hours early and then returned to work the next week after resting over the weekend. She did not miss any further work.

B. November 20, 2001.

In November 2001, Petitioner's job duties were as a cheese cook where milk was converted to cheese curd in eight large vats holding 350,000 pounds of milk that were about 25 to 40 feet long and 4.5 feet wide with the top edge of the vat at Petitioner's shoulder level. Petitioner and a coworker worked the shift in this area of the dairy. The vats were filled with milk from an overhead line that Petitioner attached to the vat. Petitioner pushed a button to begin filling. Once the vat was filled with milk and starter, it sat for 3 to 3.5 hours. During this time, Petitioner filled the other vats. Petitioner and her coworker lifted two stainless steel screens with wire used as cutters, one at a time, and attached them to an overhead mechanism above the vat. This required Petitioner to reach both arms out straight in front of her. Then, Petitioner attached a cross cut knife to an overhead mechanism and Petitioner and her coworker pushed and pulled it back and forth across the width of the vat at shoulder height for the vat's entire length through the cheese, making about 8 cuts per vat. Next, Petitioner and her coworker pulled the knives out of the vat and inserted a 6 foot heater that weighed about 5 to10 pounds into the cheese. Following this step, Petitioner and coworker inserted 6 foot stainless steel paddles on a shaft that weighed 50 to 60 pounds to an overhead mechanism above the vat. This was performed at shoulder level with Petitioner's arms outstretched. There were 2 paddles per tank and it was not uncommon to have to make more than one attempt to hook the paddle to the mechanism. After the heating/paddle process was complete, Petitioner and her coworker removed the paddles and placed them in the next vat ready for the same process. After removing the paddles, Petitioner and her coworker attached two pushers that weighed about 65 to 70 pounds to the same overhead mechanism, used for the paddles, and utilized the same movements. The pushers and paddles were lifted by Petitioner. The pushers pushed the cheese from the vat into a pipe. Once the vat was empty, Petitioner and coworker cleaned the vat by standing at the side, which is about armpit level, and reached over using a brush with a 5 to 6 foot handle to scrub the bottom and both sides of the vat. Then, Petitioner and her coworker rinsed the vat.

Two employees worked in the vat room on 12 hour shifts and 8 vats were used on each shift so there were no empty vats. Petitioner took two 15 minute breaks and a 30 to 45 minute lunch break.

Approximately three to four months before November 2001, Petitioner experienced shoulder pain that was exacerbated by work but it always resolved. In November 2001, Petitioner

experienced stiffness and soreness in her shoulder. Petitioner testified that the pain she experienced at that time was different from the intermittent pain that she felt a few months earlier. On approximately November 10, 2001, Petitioner experienced constant wrist, elbow and shoulder pain. She experienced intermittent numbness in her index finger and thumb.

On November 16, 2001, Petitioner sought treatment with Dr. Yates at the Tanner Clinic for complaints of shoulder pain for the past six days. The x-rays of Petitioner's shoulder were unremarkable but cervical spine x-rays revealed spondylosis consistent with degenerative disc disease. Dr. Tanner referred Petitioner to physical therapy at Aspen Ridge. Medical exhibit 5. Petitioner began physical therapy on November 19, 2001. The physical therapist noted "...she is not sure how she injured her neck but does a lot of lifting at work." Medical exhibit 23-28.

When Petitioner asked for a light duty assignment, Respondent sent her to WorkMed for evaluation on November 20, 2001. Petitioner was evaluated for neck pain following lifting at work and she was assessed with left cervical nerve impingement at C6-7. The physician's first report of injury noted that a work causal relationship was undetermined. Medical exhibit 45.

Dr. Yates referred the petitioner to Dr. MacFarlane for further evaluation. On January 7, 2002, a cervical MRI showed that Petitioner had a C6-7 disc herniation, disc abnormality at C5-6 and disc herniation at C4-5. Dr. MacFarlane recommended possible surgery. Medical exhibit 50-51. On January 28, 2002, Petitioner returned with pain after increasing her activity level. Surgery was scheduled for February 28, 2002. Medical exhibit 53.

On February 25, 2002, Dr. Shepherd performed an independent medical evaluation of Petitioner at Respondent's request. Dr. Shepherd found no medical causal relationship between Petitioner's work activities and the three level disc involvement. He noted that Petitioner had a pre-existing upper extremity parasthesias and, although her work might have aggravated the condition, it was not the cause. Medical exhibit 64.

On February 28, 2002, Dr. MacFarlane performed an anterior cervical discectomy and fusion and C4-C7. Medical exhibit 95. In a March 1, 2002 letter, Dr. MacFarlane states "Ms. Christensen was well prior to a work related injury of November 20, 2001..." and during the surgery, "...we did indeed find acute disc herniations at those levels. There was evidence of acute damage to the posterior longitude and the ligament with subsequent disc herniation causing compression centrally..." As a result, Dr. MacFarlane was of the opinion that Petitioner suffered an acute event as the result of a work injury. Medical exhibit 54.

On June 5, 2002, Dr. MacFarlane noted Petitioner's neck and arm pain had completely resolved. Medical exhibit 59. Petitioner was given light duty work when she was initially released to light duty on May 9, 2002.

Petitioner was again evaluated by Dr. Shepherd on June 18, 2003, and he assigned an impairment rating of 23% whole person to Petitioner's condition although he did not believe there existed a medical causal connection between a work injury and her condition. Medical exhibit 74.

Petitioner was evaluated by Dr. Dall who opined the most significant incident was the

February 1, 2001, injury when she struck her head on the electrical box based upon her description of bilateral upper extremity parasthesias. Dr. Dall assigned an impairment rating of 17% whole person impairment as the result of this injury and he noted the remaining problems Petitioner experienced were a cascade from the February 2001, injury. Medical exhibit 78-87.

Petitioner was again evaluated by Dr. Shepherd on October 3, 2003, who opined there was no medical causal connection between Petitioner's cervical disc herniations and the February 10, 2001, injury because the symptoms she had pre-dated that injury. Dr. Shepherd also noted that Dr. Dall was not given all the medical records as part of his evaluation, and he pointed specifically to the chiropractic records where Petitioner had reported numbness in her arms and hand prior to either injury. Medical exhibit 76-77.

3. Prior Medical Treatment.

Prior to 2001, Petitioner received chiropractic treatment for neck pain along with arm and hand numbness. On May 9, 1995, Petitioner sought treatment at Bennett Chiropractic and reported that she could not turn or move her neck without severe pain and she had pain in her arm. Petitioner underwent a course of treatment through June 1995. Medical exhibit 8-12. Petitioner also underwent a course of chiropractic treatment with Dr. Kunzler beginning July 20, 2000, for headache, neck pain, upper back pain and low back pain. Petitioner also reported arm numbness, left more than right. Medical exhibit 18-20. In a January 17, 2002 letter, Dr. Kunzler noted that when he examined Petitioner and took x-rays, there did not appear to be any disc problems and Petitioner's condition at that time was not severe. Medical exhibit 22.

On June 27, 1989, Petitioner had a cervical spine x-ray due to a hyperextension injury to her neck. Medical exhibit 88. Petitioner slipped in her shower and struck the right side of her head and reported increasing pain radiating up into her head and down into her right shoulder on October 19, 1992. The physician at Tanner Clinic observed no tenderness along Petitioner's cervical spine and she had normal neck range of motion although she experienced tenderness over the right occiput and down into the paraspinious muscles. Medical exhibit 2. Petitioner also had a mass in her neck removed in 1997. Medical exhibit 89-90.

4. Medical Panel Report and Supplements.

The medical panel consisted of Drs. Joseph Jarvis, Chairman, and Dennis Gordon, orthopedic surgeon. The medical panel examined Petitioner on August 5, 2004, and reviewed her medical and diagnostic records.

A. February 1, 2001.

The medical panel opined that there was no medical nexus between Petitioner's current medical condition and her industrial accident on February 1, 2001. The medical panel noted that cervical disc pathology was generally considered a consequence of chronic deterioration due to multiple factors including genetic predisposition, nutrition and physical load or stress on the spine. The medical panel further noted that a single event, such as Petitioner experienced on February 1, 2001, was unlikely to be the sole proximate or substantial cause of her cervical disc

rupture. The medical panel observed that following Petitioner's industrial accident, her symptoms resolved quickly and she resumed her regular work duties for eight months.

B. November 20, 2001.

The medical panel opined there was a medical nexus between Petitioner's current medical condition and her cumulative work injury on November 20, 2001. The medical panel noted there was published evidence that repetitive lifting and stress to the upper extremities performed by Petitioner at Respondent's facility would have contributed or aggravated deterioration of her cervical spine. The medical panel further noted that Petitioner's x-rays of November 2001, showed narrowing of the C6-7 disc space with cervical spondylosis which required an extended period of time to develop.

The medical panel further opined that other non-industrial factors may have contributed to Petitioner's cervical disc disease in addition to her work. The medical panel noted that medical literature is replete with evidence that other non-industrial factors (both inherited and acquired) would have been necessary for the development of Petitioner's condition. Therefore, the medical panel further noted, that absent the non-industrial factors, Petitioner would not have developed cervical spine problems even with the performance of her work activities. The medical panel concluded that Petitioner's repeated lifting and other work activities aggravated the preexisting non-industrial conditions which led to her symptoms and diagnosis of cervical pathology after November 2001.

The medical opined that Petitioner was medically stable on June 5, 2002, based on Dr. MacFarlane's note that Petitioner's neck and arm pain had completely resolved. The medical panel assessed an impairment rating of 17% percent whole person due to Petitioner's three level cervical disc excision and fusion. The medical panel apportioned 60% of the impairment rating to Petitioner's preexisting condition and 40% to industrial factors.

The medical panel opined that the medical care Petitioner received related to her cumulative trauma injury on November 1, 2001, was as follows: Dr. Yates evaluation in November 2001, including radiography, physical therapy at Aspen Ridge, WorkMed evaluation in November 2001, Dr. MacFarlane's evaluation in January 2002, including a MRI, Petitioner's cervical discectomy and fusion in February 2002, and follow-up care through June 2002.

DISCUSSION AND CONCLUSIONS OF LAW

Section 34A-2-401 of the Workers Compensation Act requires employers and their insurance carriers to pay disability benefits and medical expenses for employees who suffer accidental injuries "arising out of and in the course" of their employment. An injury "arises out of employment when the employment is both the legal and medical cause of the injury." *Allen v. Industrial* Commission, 729 P.2d 15 (Utah 1986). In this case, Respondent questioned whether Petitioner has satisfied the requirements of medical causation. However, before addressing the issue of medical causation, the issue of legal causation is analyzed.

1. Legal Causation.

In *Price River Coal Co. v. Industrial* Commission, 731 P.2d 1079 (Utah 1986), the Court explained the requirements of legal causation as follows:

> Under *Allen*, a usual or ordinary exertion, so long as it is an activity connected with the employee's duties, will suffice to show legal cause. However, if the claimant suffers from a pre-existing condition, then he or she must show that the employment activity involved some unusual or extraordinary exertion over and above the "usual wear and tear and exertions of nonemployment life."

The Court in *Allen* developed an objective standard of comparison to evaluate typical non-employment activities performed by today's society. Typical activities and exertions included taking full garbage cans to the street, lifting and carrying baggage for travel, changing a flat tire on a car, lifting a small child to chest height and climbing stairs.

Before a higher legal causation standard applies, an employer must prove medically that the claimant suffered from a preexisting condition that contributed to the injury. *Nyrehn v. Industrial Commission et al.*, 800 p.2d 330 (Ct. App. 1990).

A. Preexisting Condition.

The preponderance of evidence, based on the opinions of the medical panel and Dr. Shepherd, demonstrates that Petitioner suffered from a preexisting condition that contributed to her cervical condition. The medical panel observed that the narrowing of Petitioner's C6-7 disc space with cervical spondylosis required an extended period of time to develop. Dr. Shepherd noted that Petitioner had a preexisting upper extremity parasthesias.

B. Higher Legal Causation Standard.

The undisputed evidence demonstrates that Petitioner's work activities as a cheese cook in November 2001, during a 12 hour shift included the following: (1) repeat lifting/connecting lines and screen cutters over eight filled vats that were as tall as Petitioner's shoulders, (2) push/pull a knife back and forth (with Petitioner on one side of a vat and a coworker on the other side) across the width of each vat (4.5 wide) at shoulder height, (3) insert a six foot heater into each vat and insert two six foot paddles onto a shaft, weight between 50 to 60 pounds, onto an overhead mechanism above each vat – Petitioner performed this work activity by herself at shoulder level with arms outstretched, (4) remove the paddles and insert two pushers, weight between 65-70 pounds, to the overhead mechanism – Petitioner performed this work activity by herself with the same movements as the paddles (the pushers pushed the cheese into a pipe), and (5) clean each vat's sides and bottom with a five to six foot handle with attached brush standing at armpit level and reaching over the side. Petitioner and a coworker rinsed each vat.1

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1 Based on the medical panel report, Petitioner's industrial accident on February 1, 2001, was not the cause of her medical condition. *See* **Medical Causation** under **Discussion and Conclusions of Law**. Therefore, whether

The preponderance of evidence demonstrates that Petitioner's aggregate exertion, during a 12 hour shift of multiple days, of repetitive lifting, connecting, pushing/pulling and cleaning either overhead or back and forth at Petitioner's shoulder level and the repetitive lifting overhead, in tandem with a coworker, of tools that weighed up to 70 pounds, exceeded the typical nonemployment life activities identified in *Allen*. For example, typical nonemployment lift activities and exertions would include taking full garbage cans to a street, lifting and carrying baggage for travel, changing a flat tire on a car or lifting a small child to chest height. However, Petitioner performed the same work activities as described above repeatedly over eight vats that were as high as her shoulders during her work shift and over a period of approximately four months.

In *Nyhren*, the court held that the employee's cumulative lifting tubs of merchandise 30 to 36 times daily over a period of time caused unusual and extraordinary wear and tear on her body when compared to the usual wear and tear and exertions of nonemployment life as discussed in *Allen*. In the present matter, Petitioner's lifting, connecting, pushing/pulling and cleaning of items at shoulder height or overhead may not be considered unusual when performed periodically. However, Petitioner performed the same repeat work activities, multiplied by several vats, during a 12 hour work shift over a period of time. Accordingly, Petitioner's employment contributed something substantial to increase the risk she faced in everyday life because of her preexisting condition.

Based on the foregoing, Petitioner's work activities met the higher legal causation requirement under *Allen*.

2. Medical Causation.

The significance of medical causation and the importance of medical panels in evaluating medical causation was discussed in *Allen*.

> The purpose of the medical cause test is to ensure that there is a medically demonstrable causal link between the work-related exertions and the unexpected injuries that resulted from those strains.

The purpose of medical panels was discussed in *Schmidt v. Industrial Commission*, 617 P.2d 693 (Utah 1980).

> With the issue being one primarily of causation, the importance of the . . . medical panel becomes manifest. It is through the expertise of the medical panel that the Commission should be able to make the determination of whether the injury sustained a claimant is causally connected to or contributed to by the claimant's employment.

Petitioner's industrial accident on February 1, 2001, met the higher legal causation standard is not analyzed in this section.

A. Industrial Accident – February 1, 2001.

The preponderance of evidence, based on the opinions of the medical panel and Dr. Shepherd, demonstrates that there was no medical causal relationship between Petitioner's industrial accident on February 1, 2001. The medical panel opined that cervical disc pathology was generally considered a consequence of chronic deterioration due to multiple factors such as genetic disposition, smoking, nutrition and physical load or stress on the spine. The medical panel further opined that Petitioner's work activity on February 1, 2001, would not be the sole, proximate or substantial cause of her cervical disc rupture. Moreover, Petitioner's symptoms resolved quickly and Petitioner worked regular duty for eight months. Dr. Shepherd opined that Petitioner's symptoms pre-dated her industrial accident.

Based on the foregoing, Petitioner's industrial accident on February 1, 2001, did not cause her cervical condition.

B. Cumulative Trauma Injury – November 20, 2001.

The preponderance of evidence, based on the opinion of the medical panel, demonstrates that Petitioner sustained a cumulative trauma work injury on November 20, 2001. The medical panel opined that Petitioner's repetitive lifting and stress to her upper extremities contributed to or aggravated deterioration of her cervical spine.2 The medical panel observed that the narrowing of Petitioner's C6-7 disc space with cervical spondylosis would have required an extended period of time to develop.

The medical panel further opined that other non-industrial factors may have contributed to Petitioner's cervical disc disease in addition to her work. The medical panel noted that medical literature is replete with evidence that other non-industrial factors (both inherited and acquired) would have been necessary for the development of Petitioner's condition. Therefore, the medical panel further noted, that absent the non-industrial factors, Petitioner would not have developed cervical spine problems even with the performance of her work activities. The medical panel concluded that Petitioner's repeated lifting and other work activities aggravated the preexisting non-industrial conditions which led to her symptoms and diagnosis of cervical pathology after November 2001.

Petitioner's work situation was similar to the facts in *Nyhren* as discussed above. In *Nyhren*, the injured worker lifted tubs multiple times daily and experienced pain over a period of time. In this matter, Petitioner experienced periodic shoulder pain, which resolved, for approximately three months. In November 2001, Petitioner began to experience constant pain that was different than the intermittent pain she felt earlier and which caused her to seek medical attention. The period of time in which she experienced periodic shoulder pain was short until the

2 It is noteworthy that Dr. Shepherd opined that, although she had a preexisting upper extremity parasthesias, her work may have aggravated her condition – it was not the cause of her condition.

pain evolved into chronic pain thereafter. Therefore, Petitioner's claim of cumulative trauma is distinguishable from an occupational disease claim which typically evolves over a period of several months or years.

The medical panel assessed an impairment rating of 17% to Petitioner's cervical condition. And, although it apportioned 60% of the rating to non-industrial factors and 40% to industrial, the medical panel apportioned the impairment rating under the occupational disease theory and not an industrial accident theory. As Petitioner's claim was based on an industrial accident/cumulative trauma theory3, apportionment of an impairment rating would only be appropriate when there was objective medical documentation that a prior ratable impairment existed before the industrial accident in the same anatomical area. *See Utah's 2002 Impairment Guides.*

Based on the foregoing, Petitioner's cervical condition was permanently aggravated by her work activities.

3. Temporary Total and Partial Disability Compensation.

Sections 34A-2-410 and 411of the Workers Compensation Act govern temporary total and partial disability compensation.

Temporary total and partial disability compensation benefits are payable until the healing period has ended and the injured worker's condition has stabilized. "Stabilization means that the period of healing has ended and the condition of the claimant will not materially improve. Once healing has ended, the permanent nature of the claimant's disability can be assessed and benefits awarded accordingly." *Booms v. Rapp Construction Co.,* 720 P.2d 1363 (Utah 1986).

The preponderance of evidence demonstrates that Petitioner was temporarily and totally disabled from her cervical condition based on the opinions of the medical panel and Dr. MacFarlane from February 28, 2002, to May 9, 2002. Although the medical panel concurred with Dr. MacFarlane that Petitioner was medically stable on June 5, 2002, Petitioner returned to work light duty at Respondent's facility on May 9, 2002.

Petitioner did not present any evidence that Petitioner was entitled to temporary partial disability compensation.

Based on the foregoing, and pursuant to Utah Code Ann. §34A-2-410 and *Booms*, Petitioner was entitled to temporary total disability from February 28, 2002, the day of her

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3 it would be improper for this administrative forum to *sua sponte* change the theory of Petitioner's claim from cumulative trauma/industrial accident to occupational disease. *See Hilton Hotel and Reliance Insurance v. Industrial Comm'n of Utah*, 897 P. 2d. 352 (Ct of App. 1995).

surgery, to May 9, 2002, when she returned to work. Petitioner was not entitled to temporary partial disability compensation.

4. Permanent Partial Disability Compensation.

Section 34A-2-412 of the Workers Compensation Act provides for permanent partial disability compensation based upon the medical evidence.

The preponderance of the evidence, based on the opinion of the medical panel, demonstrates that Petitioner's cervical condition has an impairment rating of 17% whole person.4 Although Dr. Shepherd assigned an impairment rating of 23% to Petitioner's condition, he opined that there was no medical nexus between her condition and work injury. Accordingly, the medical panel's assessment of 17% whole person to Petitioner's condition was the most detailed and careful analysis. Although, the medical panel apportioned 60% of Petitioner's impairment rating to non-industrial factors and 40% to industrial factors, apportionment can only be calculated where there is objective medical documentation that a prior ratable impairment existed before the industrial accident for the same anatomical area. The only evidence presented regarding Petitioner's prior injuries or limitations was the industrial accident on February 1, 2001, and the medical panel did not find a causal nexus between Petitioner's cervical condition and that incident. Accordingly, as no prior impairment that existed prior to the cumulative trauma injury of November 20, 2001, was identified, apportionment of Petitioner's permanent impairment rating is not appropriate.

Based on the foregoing, Petitioner was entitled to an impairment rating of 17% whole person due to her cumulative trauma injury of November 20, 2001.

5. Medical Expenses and Recommended Medical Care.

The preponderance of evidence, based upon the opinions of the medical panel and Dr. MacFarlane, demonstrates that the medical care Petitioner received for her cervical condition since November 2001, was necessary. Both the medical panel and Dr. MacFarlane found a medical causal connection between Petitioner's cumulative trauma accident on November 20, 2001, and her need for surgery on February 28, 2002. The medical panel specifically determined that the medical treatment Petitioner received as follows was necessary to treat her condition: (1) Dr. Yates evaluation in November 2001, including radiography, and Petitioner's physical therapy, (2) Dr. MacFarlane's evaluation in January 2002, and Petitioner's MRI scan, and (3) Petitioner's cervical discectomy and fusion in February 2002, and follow-up care through June 2002.

The parties did not present any evidence in dispute that was related to the future medical care of Petitioner's cervical condition.

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4 Dr. Dall also assessed an impairment rating of 17% whole person to Petitioner's condition, however, he opined that the February 1, 2001, industrial accident caused her condition which had a cascade effect.

Based on the foregoing, Petitioner was entitled to medical expenses, beginning on or about November 16, 2001, due to her cumulative trauma accident on November 20, 2001, as specified on her Application for Hearing. Medical expenses cannot be apportioned out as Petitioner's claim is based on a cumulative trauma/industrial injury theory.

6. Travel Expenses.

Petitioner did not present any evidence of travel expenses.

ORDER

IT IS HEREBY ORDERED that Respondent shall pay to Petitioner temporary total disability compensation at the weekly rate of $421.00 from or 10.1 weeks, for a total of $4,252.10. The amount is accrued, due and payable in a lump sum plus interest at eight percent (8%) per annum.

IT IS FURTHER ORDERED that Respondent shall pay to Petitioner permanent partial disability compensation at the weekly rate of $369.00 for a permanent impairment rating of seventeen percent (17%) whole person, or 53.04 weeks, for a total of $19,571.76. The amount is accrued, due and payable in a lump sum at eight percent (8%) per annum.

IT IS FURTHER ORDERED that Respondent shall pay the statutory attorneys' fees of $4,723.58, plus 20% percent of the interest awarded herein, directly to Richard Burke, Esq., pursuant to Utah Code Ann. §34A-1-309 and Utah Administrative Code, Rule 602-2-4. That amount shall be deducted from Petitioner's award and sent directly to the office of Mr. Burke.

IT IS FURTHER ORDERED that Respondent shall pay all medical expenses, including any out-of-pocket expenses incurred by Petitioner, reasonably related to her cumulative trauma injury of November 20, 2002, pursuant to Utah Code Ann. §34A-2-418(1), and the medical and surgical fee schedule of the Utah Labor Commission, plus interest at eight percent (8%) per annum, under Utah Code Ann. §34A-2-420(3) and Utah Administrative Code, Rule 612-2-213, and travel allowances hereinafter incurred pursuant to Utah Administrative Code, Rule 612-2-20.

IT IS FURTHER ORDERED that Petitioner's claim for recommended medical care is dismissed without prejudice.

IT IS FURTHER ORDERED that Petitioner's claim for temporary partial disability compensation and travel expenses are dismissed with prejudice.

IT IS FURTHER ORDERED that Case No. 2002436 is dismissed with prejudice.

IT IS FURTHER ORDERED that Case No. 2002949 is dismissed without prejudice.

DATED THIS 29th day of June, 2006.

UTAH LABOR COMMISSION

Lorrie Lima
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

A party aggrieved by the decision may file a Motion for Review with the Adjudication Division of the Utah Labor Commission. The Motion for Review must set forth the specific basis for review and must be received by the Commission within 30 days from the date this decision is signed. Other parties may then submit their responses to the Motion for Review within 20 days of the date of the Motion for Review.

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for Review or its response. If none of the parties specifically request review by the Appeals Board, the review will be conducted by the Utah Labor Commission.

APPENDIX B

UTAH LABOR COMMISSION

GINA CHRISTENSEN, **Petitioner,** **vs.** **SMITH'S FOOD & DRUG,** **Respondent.**	**ORDER AFFIRMING ALJ'S DECISION** **Case No. 02-0436, 02-0948** and 02-0949

Smith's Food & Drug ("Smiths") asks the Utah Labor Commission to review Administrative Law Judge Lima's award of benefits to Gina Christensen under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Annotated § 63G-4-301 and § 34A-2-801(3).

BACKGROUND AND ISSUE PRESENTED

Ms. Christensen claims workers' compensation benefits from Smiths for a work accident that occurred on February 1, 2001, and cumulative work trauma that arose by November 20, 2001, thereby injuring her cervical spine. Following the evidentiary hearing, a medical panel was appointed to review the medical aspects of the case. Based on the panel's opinion, Judge Lima found that Ms. Christensen's cervical condition was aggravated by cumulative work trauma that arose in November 2001, and awarded benefits.

In its motion for review, Smiths argues that Ms. Christensen's claim should be classified as an occupational disease claim and benefits should therefore be apportioned according to the Utah Occupational Disease Act.

FINDINGS OF FACT

The Commission adopts Judge Lima's findings of facts. Those facts relevant to the issue in the motion for review can be summarized as follows:

Ms. Christensen has a history of a preexisting cervical condition dating back to 1989. Ms. Christensen worked in Smith's dairy department for eight years. Around July or August, Ms. Christensen was experiencing shoulder pain that was exacerbated from her work duties but always resolved. In November 2001, Ms. Christensen was working as a cheese cooker in the dairy. This position required her and another coworker to work together during a 12-hour shift to cook the milk down into cheese curds. The milk was cooked in eight large vats, using large and heavy equipment (60-70 pounds) that had to be hooked above the vats to stir, cut, and push the finished cheese out of

the vat. During the time period she was performing these duties, Ms. Christensen experienced stiffness and soreness in her shoulder that was different than the intermittent pain she previously had felt. On November 16, 2001, she sought medical treatment and x-rays of the cervical spine revealed spondylosis consistent with degenerative disc disease. A cervical MRI confirmed she has suffered a C6-7 disc herniation, disc abnormality at C5-6 and disc herniation at C4-5.

Ms. Christensen's doctor, Dr. MacFarlane, performed surgery and observed finding acute disc herniations in the cervical spine at various levels. In Dr. MacFarlane's opinion, Ms. Christensen suffered an acute event caused by a work injury. Smiths' medical consultant, Dr. Shepherd, disagreed and found no medical causation between Ms. Christensen's work activities and her cervical disc condition. Based on these conflicting opinions, a medical panel was appointed.

The medical panel, consisting of a doctor specializing in occupational and environmental health and an orthopedic surgeon, reviewed the medical records and examined Ms. Christensen. The panel agreed with Dr. MacFarlane's assessment and found that the cumulative work trauma that appeared by November 20, 2001, medically caused an aggravation to Ms. Christensen's preexisting cervical condition.

DISCUSSION AND CONCLUSION OF LAW

Under § 34A-2-401 of the Utah Workers' Compensation Act, in order to recover benefits, Ms. Christensen must prove that she was injured "by accident out of and in the course of" her employment. Smith's argues that Ms. Christensen did not suffer an accident compensable under the workers' compensation act, but rather, over time had developed a cervical disease condition that should be compensated under the Utah Occupational Disease Act.

Although Ms. Christensen had previously reported some shoulder stiffness and pain, as of November 20, 2001, Ms. Christensen was reporting the development of new shoulder pain unlike her previous complaints. At the time of this new development, she was repeatedly lifting and connecting lines and heavy screen cutters, paddles, and pushers over eight large vats, and then later, was cleaning the large vats, all during a 12-hour shift. Dr. MacFarlane treated Ms. Christensen and during surgery, noted acute disc herniations that, in his opinion, showed Ms. Christensen had suffered an acute injury from her work. The medical panel agreed with Dr. MacFarlane's opinion that there had been an acute event that occurred at work to cause Ms. Christensen's condition.

The Commission is convinced that due to the repetitive and unusual and extraordinary exertion required of Ms. Christensen in performing her duties as a cheese cook, she suffered a cumulative trauma injury—or "accident"—by November 20, 2001, which arose out of and in the course of her employment. Therefore, the Commission finds that benefits are appropriately awarded under the Utah Workers' Compensation Act. As this claim is a claim for workers' compensation benefits, there is no need to address whether apportionment might be appropriated under the Occupational Disease Act.

ORDER

The Commission affirms Judge Lima's decision. It is so ordered.

Dated this 16th day of March, 2009.

Sherrie Hayashi
Utah Labor Commissioner

NOTICE OF APPEAL RIGHTS

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.

APPENDIX C

UTAH LABOR COMMISSION

ALMA AVILA,	*	
	*	ORDER OF REMAND
Applicant,	*	
	*	
v.	*	
	*	
ICON HEALTH & FITNESS and THE WORKERS COMPENSATION FUND	*	
	*	
	*	Case No. 99-0776
Defendants.	*	

Icon Health & Fitness and its workers compensation insurance carrier, Workers Compensation Fund of Utah (jointly referred to as "Icon"), ask the Utah Labor Commission to review the Administrative Law Judge's award of benefits to Alma Avila under the Utah Workers' Compensation Act ("the Act"; Title 34A, Chapter 2, Utah Code Ann.).

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §34A-2-801(3) and Utah Admin. Code R602-2-1.M.

ISSUE PRESENTED

Should Ms. Avila's claim be adjudicated under the provisions of the Utah Workers' Compensation Act or the Utah Occupational Disease Act?

BACKGROUND

Ms. Avila seeks benefits for problems with her wrists related, in part, to her work duties at ICON. The ALJ has referred the medical aspects of Ms. Avila's claim to a medical panel, which has concluded that Ms. Avila suffers from Keinbock's disease, which developed gradually over time and not as the result of any specific event. However, rather than adjudicate Ms. Avila's claim under the Utah Occupational Disease Act, the ALJ applied the Utah Workers' Compensation Act.

DISCUSSION

The sole issue before the Commission is whether Ms. Avila's claim should be resolved under the Utah Workers' Compensation Act as an "injury by accident," or as an "occupational disease" under the Utah Occupational Disease Act. Admittedly, there can be some overlap in the reach of the two Acts. Nevertheless, the Utah Supreme Court has indicated that a claim may be classified as an occupational disease claim if the underlying medical complaint is a "gradually developing condition." Allen v. Industrial Commission, 729 P.2d 15, 18 (Utah 1986), citing Carling v. Industrial Commission, 399 P.2d 202 (Utah 1965).

Ms. Avila's claim for benefits is clearly based upon a gradually developing condition. The Labor Commission therefore concludes that the claim must be adjudicated according to the provisions of the Utah Occupational Disease Act.

ORDER

The Commission remands this matter to the ALJ for further proceedings consistent with this decision. It is so ordered.

Dated this 31st day of January, 2001.

R. Lee Ellertson
Utah Labor Commissioner

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Of Remand in the matter of Alma Avila, Case No. 99-0776, was mailed first class postage prepaid this 31st day of January, 2001, to the following:

ALMA AVILA
298 EAST 4775 SOUTH
OGDEN UT 84405

ICON HEALTH & FITNESS
P O BOX 160311
CLEARFIELD UT 84016-0311

ELLIOT MORRIS ATTORNEY
WORKERS COMPENSATION FUND
P O BOX 57929
SALT LAKE CITY UT 84157-0929

Sara Jenson
Support Specialist
Utah Labor Commission

Orders\99-0776

APPENDIX D

APPEALS BOARD
UTAH LABOR COMMISSION

TEMMIE K. MURPHY,	*	
	*	**ORDER ON**
Applicant,	*	**MOTIONS FOR REVIEW**
	*	
v.	*	
	*	
CITY MARKET and CNA INSURANCE,	*	
	*	**Case No. 01-0828**
Defendants.	*	

All parties to this proceeding ask the Appeals Board of the Utah Labor Commission to review Administrative Law Judge Hann's decision regarding Temmie K. Murphy's claim for benefits under the Utah Occupational Disease Act ("the Act"; Title 34A, Chapter 2, Utah Code Ann.).

The Appeals Board exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §34A-3102(2), Utah Code Ann. §34A-2-801(3) and Utah Admin. Code R602-2-1.M.

BACKGROUND AND ISSUES PRESENTED

On August 20, 2001, Ms. Murphy filed an Application For Hearing with the Commission to compel City Market and its insurance carrier, CNA Insurance (referred to jointly as "City Market" hereafter) to pay occupational disease benefits for Ms. Murphy's "cervical dystonia."[1] Ms. Murphy alleged that her dystonia had been caused by the repetitive motion of her work as a grocery checker.

At the hearing held in this matter on July 30, 2002, the parties submitted stipulated facts and agreed that Judge Hann should refer the medical aspects of Ms. Murphy's claim to a panel of medical experts. The panel issued its report on February 10, 2003. On September 12, 2003, Judge Hann issued her decision.

In summary, Judge Hann concluded that Ms. Murphy suffered from cervical spondylosis and spasmodic torticollis, aggravated, but not caused, by her work at City Market. Judge Hann further

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1 The following definitions of medical terms used in this decision are taken from Dorland's Illustrated Medical Dictionary, 27th Edition. "Dystonia" is disordered tonicity of muscle. "Cervical spondylosis" is degenerative joint disease affecting the cervical vertebrae, intervertebral discs, and surrounding ligaments and connective tissue, sometimes with pain or parasthesia radiating down the arms as a result of pressure on the nerve roots. "Spasmodic torticollis" is a contracted state of the cervical muscles, occurring intermittently and producing twisting of the neck and an unnatural position of the head.

concluded that the work-related aggravation of Ms. Murphy's underlying condition had ended by the time she stopped working at City Market. Consequently, Ms. Murphy was not entitled to any disability compensation for lost wages. However, Judge Hann ordered City Market to pay Ms. Murphy's expenses incurred in the medical treatment of her spondylosis and torticollis.

In its motion for review of Judge Hann's decision, City Market argues Ms. Murphy is not entitled to any benefits because her spondylosis and torticollis are not within the coverage of the Occupational Disease Act. Alternatively, City Market argues that, even if Ms. Murphy is entitled to the medical benefits awarded by Judge Hann, the amount of those benefits must be determined according to the proportion by which Ms. Murphy's work at City Market contributed to her occupational disease.

Ms. Murphy's motion for review argues she is entitled to disability compensation and expenses of future medical for a continuing work-related aggravation of her pre-existing spondylosis and torticollis.

FINDINGS OF FACT

The parties have stipulated to the underlying facts of Ms. Murphy's claim. With respect to the medical aspects of Ms. Murphy's claim, the Appeals Board finds the medical panel's report to be persuasive. On that basis, the facts relevant to the issues raised by the parties' motions for review may be summarized as follows.

Ms. Murphy worked for City Market for more than 11 years, primarily as a grocery checker, beginning in December, 1989. As early as 1992, Ms. Murphy was diagnosed with cervical spondylosis. In 1996, she began to experience cervical spasms. By 2000, she was diagnosed with torticollis. She stopped working at City Market in May, 2001.

The preponderance of medical evidence, particularly the medical panel's report, establishes that Ms. Murphy does, in fact, suffer from cervical spondylosis with secondary spasmodic torticollis and dizziness. Her work at City Market did not cause the spondylosis, torticollis, or dizziness, but did exacerbate those conditions. While Ms. Murphy continued to work at City Market, 40% of her medical problems were attributable to work-related aggravations of her underlying condition. This exacerbation continued until Ms. Murphy stopped working.

Ms. Murphy's past medical care has been necessary to diagnose and treat the work-related aggravation of her underlying condition, but any ongoing medical care is attributable to her underlying medical problems, rather than to her work at City Market.

DISCUSSION AND CONCLUSIONS OF LAW

Section 34A-3-104(1) of the Utah Occupational Disease Act provides that "Every employer is liable for the payment of disability and medical benefits to every employee who becomes disabled . . . by reason of an occupational disease under the terms of this chapter." Section 34A-3-103 of the Act defines a "compensable occupational disease" as "any disease or illness that arises out of and in the course of employment and is medically caused or aggravated by that employment." The fundamental question raised by City Market's motion for review is whether a work-related aggravation of a non-work-related disease is compensable under the Act.

City Market argues that the work-related aggravation of Ms. Murphy's spondylosis and torticollis does not meet the Act's definition of "compensable occupational disease" because those conditions did not "arise out of and in the course of her employment" within the meaning of Section 34A-3-103. To support this argument, City Market cites two Utah Supreme Court decisions: Young v. Salt Lake City, 90 P.2d 174 (Utah 1939) and Edlund v. Industrial Commission, 248 P.2d 365 (Utah 1952).

Young was decided in 1939, before Utah had even adopted an occupational disease law. Young merely addressed the means of distinguishing accidental injuries, which were compensable at that time pursuant to the Workers' Compensation Act, and occupational diseases, which were compensable, if at all, in civil tort actions.[2] By 1952, when the Supreme Court decided Edlund, Utah had enacted an Occupational Disease Act. However, the coverage provisions of the Act interpreted in Edlund were repealed in 1991 and replaced by very different provisions now in the Act. Thus, neither Young nor Edlund is helpful in evaluating Ms. Murphy's right to benefits under the current Act. The Appeals Board therefore turns to the Act itself.

The plain language of the Act encompasses payment of compensation for a work-related aggravation of a non-work-related disease. Section 34A-3-103 includes aggravation as part of the definition of a compensable occupational disease. Likewise, Section 34A-3-110(4) provides for apportioning compensation "when disability . . . from any other cause not itself compensable is aggravated, prolonged, accelerated, or in any way contributed to by an occupational disease." This apportionment provision would be unnecessary if, as City Market argues, the work-related aggravation of an underlying non-work-related condition is not compensable at all. The Appeals Board believes the Legislature included the foregoing provision advisedly, in recognition that the aggravation of non-work-related conditions is compensable under the Act.

In light of the foregoing provisions of the Act and the principle that the Act should be construed liberally in favor of coverage and compensation, the Appeals Board concludes that the work-related aggravation of Ms. Murphy's non-work-related spondylosis and torticollis is

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2 As observed in *Larson's Workers' Compensation Law*, section 52.03(2): "It is of little value, and indeed, may be quite misleading, to quote indiscriminately from old definitions whose only purpose was distinguishing accident."

compensable under the Act.[3]

As an alternative argument, City Market contends that, if Ms. Murphy's condition is compensable under the Act, then her right to benefits must be computed according to Section 34A-3-110, which reduces City Market's liability in proportion to the degree Ms. Murphy's work at City Market contributed to her condition. Although the statutory language of Section 34A-3-110 is not a model of clarity, the Appeals Board agrees with City Market's interpretation. The Appeals Board has previously determined that Ms. Murphy's work at City Market bears a 40% causal relationship to her condition; consequently, City Market's liability is limited to 40% of any medical expenses or other benefits awarded to Ms. Murphy.

The Appeals Board now turns to Ms. Murphy's argument that she suffers from continuing and permanent work-related aggravation of her pre-existing condition, and is therefore entitled to additional compensation. Ms. Murphy's argument turns on questions of medical fact and opinion. The preponderance of the medical evidence, including the opinion of the impartial medical panel, establishes that any work-related aggravation of her underlying spondylosis and torticollis had ended by the time Ms. Murphy stopped work at City Market. Consequently, no basis exists to award additional compensation to Ms. Murphy.

ORDER

The Appeals Board grants City Market's motion for review with respect to its liability for Ms. Murphy's medical expenses and modifies Judge Hann's Order as follows:

> It is hereby ordered that City Market and/or CNA Insurance, pay 40% of Ms. Murphy's expenses for medical care of her cervical spondylosis and spasmodic torticollis, consistent with the Labor Commission's medical fee schedule.

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3 An extension of occupational disease coverage for work-related aggravation of non-work conditions has occurred in other states, as well as in Utah. As observed in Larson's Workers' Compensation Law,section 52.06(3):

> It can readily be seen, as this process has gone forward, the line between occupational disease and aggravation of preexisting disease or weakness has become blurred. The ultimate working rule that seems to emerge is simply that a disability which would be held to arise out of the employment under the tests of increased risk and aggravation for a preexisting condition will be treated as an occupational disease.

Larson then refers to section 9.02(3)of his treatise, where he notes the general rule that "preexisting disease or infirmity does not disqualify a claim under the 'arising out of employment' requirement if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the . . . disability for which compensation is sought."

In all other respects, the Appeals Board affirms Judge Hann's decision and denies both City Market and Ms. Murphy's motions for review. It is so ordered.

Dated this 5th day of April, 2004.

Colleen S. Colton, Chair

Patricia S. Drawe

Joseph E. Hatch

NOTICE OF APPEAL RIGHTS

Any party may ask the Appeals Board of the Utah Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Appeals Board within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.